EXHIBIT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of		
Evaluation of the Syndication	)	
	)	
and	)	MM Docket No. 90-162
	)	
Financial Interest Rules	)	

MEMORANDUM IN SUPPORT OF COMMENTS OF THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

The Association of Independent Television Stations, Inc. ("INTV"), by its counsel, hereby submits a brief in support of its comments in response the Commission's *Notice of Proposed Rulemaking*, 5 FCC Rcd 1815 (1990) [hereinafter cited as *Notice*], in the above-captioned proceeding. This legal memorandum sets forth the proper standard of review of an agency decision to abandon longstanding rules. In INTV's view, it leaves no doubt that those who seek relaxation or elimination of the FISR must carry the burden of showing that a change in the rules would serve the public interest

The Commission in this proceeding is considering modifications to its network financial interest and syndication rules. 47 CFR § 73.658(j) [hereinafter cited as "FISR"]. The FISR were adopted in 1970, were affirmed on appeal, and have remained substantially intact for 20 years. *Report and Order*, 23 FCC 2d 382 (1970), *on reconsideration,* 25 FCC 2d 318

(1970), *aff'd sub nom., Mt. Mansfield Television, Inc.* , 442 F. 2d 470 (2d Cir. 1971). In no way, therefore, may this be considered a case where the Commission is making an *initial* determination whether to adopt new rules. In such instances the Commission must overcome a presumption that regulation is unnecessary. In other words, those who favor the imposition of regulation must make the case for regulation. In this proceeding, however, the Commission is considering relaxation or rescission of long-standing rules designed to further the most fundamental of communications policy goals--program source diversity and competition. Consequently, those who seek modification or elimination of the rules must make the case for changes they urge.

The Administrative Procedure Act requires that an agency changing established policy or rescinding long-standing rules satisfy a more stringent standard than an agency refusing to consider new regulations in the first instance. To paraphrase Frederick Lowe's lyrics from the title song to the musical *Camelot*, "The Court has made it clear." In *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 77 L. Ed 2d 443, 103 S Ct 2856 (1983) [hereinafter cited as *MVMA*] , the Court held that the National Highway Traffic Safety Administration's (NHTSA) rescission of passive restraint requirements was arbitrary and capricious. In so holding, the Court expressly and unequivocally refused to treat the revocation of a regulation as a refusal by an agency to promulgate regulations in the first place. The Court stated:

> [T]he revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal

> of the agency's former views as to the proper course. A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. *There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.*" Atchison, T. & S.F. R. Co. v Wichita Bd. of Trade, 412 US 800, 807-808, 37 L Ed 2d 350, 93 S Ct 2367 (1973). Accordingly, an agency changing its course by rescinding a rule is obligated to *supply a reasoned analysis for the change* beyond that which may be required when an agency does not act in the first instance.

MVMA, 463 U.S at 41-42, 77 L Ed at 457 [emphasis supplied]. The rationale of the Court's holding was stated with abundant clarity. While recognizing an agency's latitude to respond to changing circumstances, the Court noted that:

> [T]he forces of change do not always or necessarily point in the direction of deregulation. In the abstact, there is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of curent regulation.

MVMA, 463 US at 42, 77 L Ed 2d at 457.

The Court went on to articulate what it considered the proper approach for an agency considering abolition of existing rules:

> [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including "a rational connection between the facts found and the choice made." Burlington Truck Lines, Inc., v United States, 371 US 156, 168, 9 L Ed 2d 207, 83 S Ct 239 (1962).

No less instructive is the Court's description of its role in reviewing such a decision by an agency. Whereas the Court aknowledged that "the scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency," it left no doubt that even appropriate judicial deference is not unbounded:

> In reviewing the [agency's] explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Bowman Transportation, Inc. v Arkansas-Best Freight System, Inc., supra, at 285, 42 L Ed 2d 447, 95 S Ct 438; Citizens to Preserve Overton Park v Volpe, supra, at 416, 28 L Ed 2d 136, 91 S Ct 814.

MVMA, 463 US at 43, && L Ed 2d at 457-458.

In *MVMA* the Court faulted the NHTSA's decision in several critical respects. First, the Court found that the NHTSA had given no consideration to requiring that airbags (in *lieu* of either airbags or automatic seatbelts) be installed in automobiles. The NHTSA had dtermined that passive restraint rules were ineffective based on a finding that automatic seat belts would produce more limited benefits than anticipated. It continued to acknowledge the safety benefits of airbags. Therefore, eliminating the passive restraint rule in its entirety--despite the efficacy of airbags and without consideration of an airbag-only requirement--was inadequate. A crucial alternative had been virtually ignored.

Second, the Court held that the NHTSA had failed to explain adequately why it had dismissed the safety benefits of automatic seatbelts. In essence, the record failed to support the agency's decision. Although evidence in he record provided "no reliable real world experience" that seatbelt usage would increase if automatic(passive) seatbelts still were required, the Court held that the NHTSA wrongly concluded that automatic seatbelts offered no significant safety benefit. The NHTSA, for example, failed to consider factors suggesting that seatbelt use would increase to a meaningful degree even if detachable automatic belts were required. *MVMA,* 463 US at 54, 77 L Ed at 465. Similarly, the NHTSA had failed to explain its determination that the public would react adversely to one type of passive seatbelt (which did not interfere with vehicle operation) as it had to ignition interlocks (which did interefere with vehicle operation). *Id.* , 463 US at 56-57, 77 L Ed 2d at 466. As the Court concluded:

> "An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing course must supply a reasoned analysis...." Greater Boston Television Corp. v FCC, 143 US App DC 383, 394, 444 F2d 841, 852 (1970) (footnote omitted) cert denied, 403 US 923, 29 L Ed 2d 701, 91 S Ct 2233 (1971).

Id., 463 US at 57, 77 L Ed 2d at 466. The Court's instruction to the Commission in this proceeding, therefore, is to: (1) rely on factors which Congress intends the Commission to consider; (2) consider all important aspects of the issue; (3) offer an explanation of its action which is consistent with the evidence before it; and (4) make findings supported by substantial evidence on the record considered as a whole. *MVMA*, 463 US at 43-44, 77 L Ed at 458.

The Commission must tread with considerable caution in considering any revision to the FISR. The Commission's zest for deregulation often has led the Commission astray only to be reined in by a reviewing court. More than once the United States Court of Appeals for the District of Columbia Circuit has reminded the Commission of its

> [R]igorous insistence on the need for conjunction of articulated standards and reflective findings, in furtherance of even-handed application of law, rather than impermissible whim, improper influence, or misplaced zeal.

Greater Boston Television Corporation v. FCC, 444 F2d 841, 852 (D.C. Cir.1970), *cert denied*, 403 US 923, 29 L Ed 2d 701, 91 S Ct 2233 (1971) [hereinafter cited as *Greater Boston*]. The court has noted that "abrupt shifts in policy do constitute 'danger signals' that the Commission may be acting inconsistently with its statutory mandate." *Office of Communications of the United Church of Christ V. FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983) [hereinafter cited as *UCC III*]. Therefore, in reviewing the Commission's broad deregulation of commercial radio, the court pointed out:

> In fact, in this case our level of scrutiny is heightened because so many of the Commission's actions involve some departure from prior policies and precedents.

UCC III, 707 F.2d at 1425. The court also noted a recent exposition of its expectations of an agency changing established rules:

> [I]t is vital that an agency justify a departure from its prior determination.* * [T]he requirement of reasons imposes a measure of discipline on the agency, discouraging arbitrary or capricious action by demanding a rational and considered discussion of the need for a new agency standard. The process

> of providing a rationale that can withstand public and judicial scrutiny compels the agency to take rule changes seriously. The agency will be less likely to make changes that are not supported by the relevant law and facts. * * *

Baltimore & Annapolis Railroad Co. V. WMATC, 642 F. 2d 1365, 1370 (D.C. Cir. 1980), *cited in UCC III*, 707 F. 2d at 1426 [footnote omitted].

In *UCC III* the court remanded the Commission's decision to eliminate longstanding radio programming log requirements, concluding that "the Commission has simply falied to provide a sufficiently coherent justification for the elimination of the logs." 707 F. 2d at 1442. In particuler, the court stated that "the Commission has failed to give adequate consideration to the vital information role that the logging requirements presently serve in the overall scheme of the Communications Act." *Id.* The Commission had eliminated the logging requirements based on the a cost-benefit analysis. In light of the substantial record-keeping burden and the very limited marginal utility of the log information in the absence of non-entertainment and commercialization guidelines, the Commission eliminated the rules in their entirety. In the court's view the Commission's analysis was too narrow. The proper focal point of the analysis should not have been whether the existing rules were cost-effective given the elimination of requirements based on the information recored in the logs, but whether the Commission's otherwise revised scheme of radio regulation created new and/or different informational needs:

> Instead of addressing this crucial and basic question, the Commission engages in a highly restrictive justification for its decision to eliminate the current logging requirements. For example, the Commission essentially argues that because

> certain quantitative guidelines have been eliminated, the information elicited by the logs is no longer relevant; therefore, the logs themselves can also be eliminated. This reasoning is unsound. Of course, a logging requirement designed to make available certain information relevant under one regulatory scheme will seem useless and expendable if transplanted unchanged to a new regulatory scheme.
>
> The relevant question thus should be whether a revised comprehensive logging requirement....might not produce benefits that would outweigh the record-keeping costs.

UCC III, 707 F.2d at 1441. As in the case of the passive restraint requirements in *MVMA*, *supra*, relevant issues and alternative regulatory alternatives had been dismissed without explanation or ignored.

The court admonished the Commission that "rational decisionmaking also dictates that the agency simply cannot employ means that actually undercut its own purported goals." *Office of Communications of the United Church of Christ V. FCC*, 779 F.2d 702, 707 (D.C. Cir. 1985) [hereinafter cited as *UCC IV*]. At the heart of the matter was the court's concern that the public had been left with "insufficient information to evaluate the programming of broadcast licensees." *UCC IV*, 779 F.2d at 704. The court found inadequate a new requirement that broadcast radio stations on an annual basis place in their public files for public scrutiny a list of five to ten issues of concern in the community and examples of programs broadcast in an effort to address those needs. The court reasoned that only through constant monitoring could a member of the public gauge a station's *overall* public service performance because the newly required list would provide only illustrative examples. *UCC III*, 707 F. 2d at 1441. Consequently,

according to the court, the public would be unable to exercise its "unassailable right to to participate in the disposition of valuable public licenses...." *Id.* Consequently, the court in remanded the matter to the agency for further consideration and explanation.

On remand the Commission adopted a new approach, which also failed to withstand judicial scrutiny. *UCC IV.*Again, the court faulted the Commission for failing to explain adequately why certain alternative proposals had been rejected. The Commission had adopted a requirement that radio stations on a quarterly basis place in their public files a list of no less than five community issues addressed in the station's programming in the preceding three months. The new rule, however, in the court's eyes, suffered the same tragic flaw as the previous rule--namely, that a "merely illustrative list" may not reflect a station's overall efforts. *UCC IV*, 779 F.2d at 712. Moreover, a proposal that stations list programs which had provided "significant treatment" of community issues, had been rejected by the Commission without a "single word of explanation." *Id.*, 779 F.2d at 713-714. Such a list, the court noted, appeared adequate to permit the public to evaluate a station's overall programming because under such a regime, the station itself would have held out the list as including all significant treatment of community issues in a station's programming. *Id.* Therefore, the court remanded the matter to the Commission once again to consider that specific alternative or any other adequate means of preserving the public's ability to evaluate and challenge a station's performance.

Television deregulation also brought the Commission a slap on the wrist from the court for failing to provide a "reasoned basis" for altering its long-established policy setting forth children's television commercialization guidelines. *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C.Cir. 1987) [hereinafter cited as *ACT*]. A two-sentence/two footnote explanation was held to cross the line long ago drawn in the sand by the court from the "tolerably terse to the intolerably mute." *Greater Boston*, 444 F.2d at 852. Of particular concern to the court was the Commission's failure to explain its about-face on the critical question whether the marketplace functioned adequately to restrain commercialization in children's television programming:

> For almost 15 years, the FCC's regulation of children's television was founded on the premise that the television marketplace *does not* function adequately when children make up the audience....The Commission has offered neither facts nor analysis to the effect that its earlier concerns over market failure were overemphasized, misguided, outdated, or just downright incorrect. Instead, without explanation, the Commission has suddenly embraced what had theretofore been an unthinkable bureaucratic conclusion that the market did in fact operate to restrain the commercial content of children's television.

ACT, 821 F.2d at 746. In view of its conclusion, the court remanded the matter to the Commission for elaboration.

Equally instructive in this proceeding are cases wherein the Commission has adequately justified significant changes in its rules based on analysis of substantial and complex economic relationships. In *Malrite*

T.V. of New York v. FCC, 652 F.2d 1140 (2d. Cir. 1981), the court upheld the Commission's elimination of its cable television distant signal and syndicated exclusivity rules. The court found that the Commission had produced an "overwhelming mass of evidence supporting elimination of the rules." *Id.*, 652 F.2d at 1152. Then the Commission had sought more comment from the public to assure that no stone remained unturned. The Commission compiled and/or reviewed numerous economic studies in reaching its decision. It responded to criticisms of its own studies, "articulating clear reasons when it rejected, or did not fully use, the economic predictions in industry studies due to erroneous assumptions or modeling flaws." *Id.*, 652 F.2d at 1149. In response to arguments that the Commission impermissibly had shifted the burden of proof from parties seeking repeal of the rules to those urging retention, the court emphasized that the FCC proposed elimination of the rules only "after an extended inquiry into the effect of the existing regulations and the state of the industry that encompassed several years of investigation, and thorough consideration of the vast material compiled...." *Id.*, 652 F.2d at 1152.

No less is required in terms of relaxation or rescission of FISR. The FISR were adopted after extensive inquiry and consideration. The correctness of the Commission's decision was acknowledged by the court. Mt. Mansfield Television, Inc., supra.. Moreover, the wisdom and rightness of the Commission's imposition of the rules was later underscored by the entry of consent decrees subjecting the networks to identical limitations over their involvement in television program syndication. United States v. National Broadcasting Co. 449 F.Supp. 1127

(C.D. Cal. 1978); United States v. CBS, Inc., Civ. No. 74-3599-RJK (C.D. Cal. July 31, 1980); United States v. ABC, Inc., Civil No. 74-3600 (C.D. Cal.) [subsequent history omitted]. Most of all, of course, the rules have let the market function without the encumberance of network domination and, thereby, spawned the growth and development of independent television. FISR is a Commission success story. If the FISR are to be tampered with at all, those who seek their demise must come forth with substantial eveidence and sound reasoning with which the Commission could undergird every aspect of its decision. Otherwise, the Commission's decision faces inevitable rebuff by the courts .

CERTIFICATE OF SERVICE

I, Susan Baurenfeind, hereby certify that on this 14th day of June, 1994, I have caused to be served by first-class mail, postage prepaid, a copy of the foregoing "Comments of the Association of Independent Television Stations, Inc.," to the individuals listed below:

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